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Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1[redacted] 119

ADVANCE TRANSPORTATION COMPANY,
A CORPORATION,
Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER AND ALBERT F. WAGNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Summary of Argument.

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OCTOBER TERM, A. D. 1941.

No. 1285.

ADVANCE TRANSPORTATION COMPANY,
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vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER AND ALBERT F. WAGNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Additional Facts.

Petitioner (hereinafter referred to as "defendant") has not stated all of the pertinent facts, and has misstated some of the evidence. For a complete picture of the occurrence a supplemental statement is, therefore, required.

At about 10:00 o'clock at night, the driver of a southbound truck on Skokie Highway (a 4-lane paved country highway and one of the main intercity arterial highways

leading north from Chicago) pulled off the highway to the west and was unable to get back on the pavement. Fellow truckers traveling south stopped to assist and to pull the stalled truck back onto the pavement. Shortly thereafter three of defendant's drivers, northbound, seeing the situation, stopped and parked their three large "boxcar" trucks on the righthand or east lane of the paved highway, one directly ahead of the other. There was no necessity for stopping where they did. None of their trucks was out of fuel or had any mechanical breakdown. Immediately beside the place where the three trucks stopped there was a good solid shoulder 9½ feet wide, made of crushed stone, clay, and grass (R. 105). Just a few minutes before the accident, a large 35 foot truck had pulled off the pavement onto this shoulder, stayed there a few moments, and then, without difficulty, pulled back onto the highway and went on (R. 71 and 81). After the accident, a large tow truck used this shoulder (R. 106), as did a number of other automobiles. The shoulder ran north for about 200 feet where it widened out into a large apron 500 feet long and 50 feet wide, made of hard half-inch and quarter-inch stone. This was a parking place for cars in front of the Chalet roadhouse (R. 109).

There was at the time of the accident, in full force and effect in the State of Illinois, a statute, § 88, Chap. 95½ (see Appendix), making it unlawful for any person to stop, park or leave standing any vehicle, whether attended or unattended, upon any highway outside of a business, residence or suburban district upon the paved, improved or main-traveled part of the highway when it is practical to park, stop or so leave such vehicle off such part of said highway.

After coming to a stop on the pavement, Reid, the driver of the defendant's rear truck (with which the plaintiffs collided), abandoned his truck and went over across the

highway with a lighted fusee in his hand and stood beside the mired truck on the west side of the highway, helping protect southbound traffic (R. 85). He was over there three or four minutes before the collision occurred (R. 86). After the collision, Reid told the highway police officer that he had used up all of the red fusees he had in his truck helping the fellow on the west side, who was in the ditch, and that at the time of the collision "he was over on the west side helping the fellow who was in the ditch" (R. 467).

The driver of another of defendant's trucks likewise left his truck and proceeded to the west side with a lighted fusee in his hand (R. 74). At no time prior to the collision in question did any of the truck drivers of the defendant put out any flares or fusees near or around or behind any of the defendant's trucks. All of the trucks of the defendant carried a supply of red fusees, but the only light, guard, protection or warning of any kind used or put out at the rear of defendant's parked truck to warn northbound traffic was a small flashlight in the hand of the driver of the defendant's head truck, who was standing about 8 or 10 feet behind Reid's truck. None of the plaintiffs, except Foster, saw this flashlight (R. 205).

As to tail or rear lights on the defendant's truck, the plaintiff, Foster, testified that "there were no lights that I saw on the rear of that truck" (R. 205). The plaintiffs, Shoffner (R. 157), Wagner (R. 137), and Miller (R. 249), all testified that they did not see any lights on the rear of defendant's truck.

The State Highway police officer arrived at the scene about 15 or 20 minutes after the accident. He testified that there was no tail light of any kind on the rear of defendant's rear truck (R. 101); that he asked the driver, Reid, what was the matter with his rear lights, and Reid went back to look, saw there were no lights, then went up

between the trailer and the truck and did something, whereupon the lights went on (R. 102).

The body of the defendant's truck was about 12 feet high, and the entire rear of it was closed with a tail gate, painted red. There was a large number of red flares, lighted and burning on the west side of the highway, and these flares cast a red glow into the atmosphere and over the landscape, causing the red body of the truck to blend into the surroundings so as to make it undiscernible as one traveled toward it. There was also a number of kerosene flare pots on the west side, the smudge and smoke of which was being blown across the highway from the west.

Reasons Why Petition for Certiorari Should Be Denied.

1. No special or important reason, as suggested by Rule 38 (5) of the rules of this court, is presented in this case for granting certiorari. The case involves nothing except the usual, ordinary issues of fact in negligence cases, to-wit: the negligence of the defendant, freedom from contributory negligence, and proximate cause of injury.

2. In affirming the judgment of the trial court, the Circuit Court of Appeals has followed the well-established law laid down by the Supreme and Appellate Courts of Illinois and the United States, that the questions of the existence of negligence, freedom from contributory negligence, and proximate cause are questions of fact for the jury and become questions of law only when there is no evidence in the record which fairly tends to prove these elements of the plaintiffs' case.

3. The Circuit Court of Appeals committed no error in holding that there was no variance between the allegations of the complaints that the accident happened outside

the limits of any city, village or incorporated town, and the proof adduced, because:

(a) By its sworn answers the defendant admitted the allegations of the complaints;

(b) The plaintiffs introduced no proof contrary to the allegations;

(c) The only proof offered by the defendant that the accident occurred inside an incorporated area was stricken, and the jury instructed by the trial court to disregard it; (No error was ever assigned by the defendant on such ruling.)

(d) The alleged variance was not material or fatal because there were eight specifications of negligence, including general negligence, set forth in the complaint, at least five of which pertained to both incorporated and unincorporated areas.

SUMMARY OF ARGUMENT.

I.

No Special or Important Reason, as Suggested by Rule 38 (5) of the Rules of This Court, Is Presented for the Granting of the Writ.

(See Argument.)

II.

The Circuit Court of Appeals Has Followed the Well-Established Law Laid Down by the Supreme and Appellate Courts of Illinois and the United States That the Existence of Negligence, Freedom From Contributory Negligence, and Proximate Cause Are Questions of Fact for the Jury.

a. **The evidence is sufficient to support the verdicts.**

Shannon v. *Nightingale*, 321 Ill. 168, 175.

Long Transp. Co. v. *Domurat, et al.*, 93 Fed. (2d) 23, 24.

Gunning v. *Cooley*, 281 U. S. 90, 94.

Grand Trunk Railway Company v. *Ives*, 144 U. S. 408, 417.

Western & Atlantic R. R. v. *Hughes*, 278 U. S. 496, 498.

b. **The question of plaintiffs' contributory negligence was one of fact and not of law, and was properly submitted to the jury.**

Skamenca v. *Reeser*, 294 Ill. App. 216, 221.

Mapes v. *Hulcher*, 363 Ill. 227, 228, 231.

c. **Driving with dimmer or deflected lights is not negligence as a matter of law, but the question of negligence in such case is one to be determined in view of all the facts and circumstances in evidence**

Miller v. *Burch,* 254 Ill. App. 387, 391, 394, 397.

Carroll v. *Krause,* 295 Ill. App. 552, 566.

d. **The plaintiffs were entitled to assume that the highway ahead of them was not unlawfully obstructed, and their actions after entering the area of smoke and glare were those of reasonably prudent men, in view of all the surrounding circumstances.**

Sidle v. *Baker,* 52 Ohio App. 89, 93, 94; 3 N. E. (2d) 537.

Body, Fender & Brake Corp. v. *Matter,* 172 Va. 26, 30-2; 200 S. E. 589.

Moyer v. *Vaughan's Seed Store,* 242 Ill. App. 308, 312, 313.

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e. **The illegal parking on the highway of defendant's truck was the proximate cause of plaintiffs' injuries.**

Rhoden v. *Peoria Creamery Co., et al.,* 278 Ill. App. 452, 462-3, 467.

Bos v. *Richards,* 71 Fed. (2d) 262, 263.

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Mapes v. *Hulcher,* 363 Ill. 227, 228, 231.

III.

There Was No Variance Between the Allegations of the Complaints and the Proof.

(See Argument.)

ARGUMENT.

I.

No Special or Important Reason, as Suggested by Rule 38 (5) of the Rules of This Court, Is Presented for the Granting of the Writ.

This is an ordinary negligence case arising out of a collision between defendant's parked truck and the automobile in which plaintiffs were riding. It involves nothing except the usual ordinary issues of fact in negligence cases, namely, the negligence of the defendant, freedom from contributory negligence, and proximate cause of injury. No new or unusual principles of negligence law are involved nor have established principles been erroneously applied or departed from so as to give the subject case sufficient importance to be reviewed by this court.

We do not believe it necessary, in order to point out to this court the lack of necessity for its review of this cause, to answer in detail all of the arguments of fact and quotations from cases contained in defendant's 75 pages of brief in support of its petition for certiorari. We shall, therefore, limit ourselves to a few authorities on the issues involved, all establishing that the Circuit Court of Appeals correctly applied and followed the Illinois law in holding that the issues here involved were properly questions of fact for the jury.

II.

The Circuit Court of Appeals Has Followed the Well-Established Law Laid Down by the Supreme and Appellate Courts of Illinois and the United States That the Existence of Negligence, Freedom From Contributory Negligence, and Proximate Cause Are Questions of Fact for the Jury.

No motion for new trial was made and no error is alleged in the court's rulings on evidence or the giving or refusal of instructions. Defendant has failed to preserve in the printed record the instructions given or refused and the inference from such failure necessarily must be that the trial court followed the rule of *Erie R. Co.* v. *Tompkins* and properly instructed the jury as to the elements which, under the law of Illinois, the plaintiffs were affirmatively required to prove in order to recover, including freedom from contributory negligence. The only error assigned by defendant is that the trial court erred in refusing to direct verdicts for defendant and to set aside the verdicts and enter judgments for the defendant because defendant contends: (1) As a matter of law the plaintiffs did not prove that (a) the defendant was negligent; (b) the plaintiffs were free from contributory negligence; (c) the parking of the truck on the paved highway was the proximate cause of the injury, and (2) There was a variance between the complaint and the proof as to the location of the accident.

a. The evidence is sufficient to support the verdicts.

We direct the court's attention to some of the leading cases setting forth the rule as to when the court should or should not direct a verdict.

In *Shannon* v. *Nightingale,* 321 Ill. 168, 175, the Illinois Supreme Court said:

"If there is evidence which fairly tends to support

the plaintiff's case it must be submitted to the jury, (*Purdy* v. *Hall,* 134 Ill. 298; *Pullman Palace Car Co.* v. *Laack,* 143 Ill. 242; *Lake Shore and Michigan Southern Railway Co.* v. *Richards,* 152 Ill. 59; and no question of its sufficiency to support the verdict can be raised in this court. It is a question of law whether there is any evidence tending to prove the allegation of the plaintiff's declaration, and it is a question of fact, where there is such evidence, whether it is sufficient to sustain such allegations. The former is a question for the court; the latter is a question for the jury, subject to revision by the court on motion for a new trial. Therefore the court may not properly take the case from the jury and direct a finding for the defendant when there is some evidence tending to prove every essential allegation of the plaintiff's declaration, merely because, in the judgment of the court, the weight of the evidence in support of some material allegation is not sufficient to sustain a verdict for the plaintiff. If the evidence in support of the plaintiff's allegations is sufficient to make a prima facie case, the court is not authorized to direct a verdict for the defendant because of evidence of contrary facts tending to an opposite conclusion. On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor."

The above case was cited with approval in *Long Transp. Co.* v. *Domurat, et al.,* 93 Fed. (2d) 23, 24, wherein the court said:

"Under this situation we are urged to hold that the trial court erred in its refusal to direct a verdict in favor of appellant. In other words, we are asked to say, as a matter of law, either there was no evidence proving negligence of appellant, or that the evidence shows appellees' negligence was the contributing and proximate cause of the accident. The rule has often been announced that we have no duty or right to weigh

the evidence, but merely to ascertain if there is evidence sufficient to sustain the finding of the jury. *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; *Madison Coal Corp.* v. *Stullken*, (C. C. A.) 228 F. 307; *Shannon* v. *Nightingale*, 321 Ill. 168, 151 N. E. 573."

In *Gunning* v. *Cooley*, 281 U. S. 90, 94 the court said:

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

In *Grand Trunk Railway Company* v. *Ives*, 144 U. S. 408, 417, the court said:

"When a given state of facts is such that reasonable men may fairly differ upon the question * * * the determination of the matter is for the jury. * * * It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question * * * is ever considered as one of law for the court."

In *Western & Atlantic R. R.* v. *Hughes*, 278 U. S. 496, 498, the court said:

"The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. * * * Some of the testimony given by witnesses for the Railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

It is charged in the Complaint (R. 4) that the defendant was careless and negligent in the operation and control of its motor truck in one or more of eight specified ways, to-wit: that it carelessly and negligently stopped and parked its motor truck at a place where it was known or

should have been known it was dangerous to northbound vehicles on the highway, in that it was known or should have been known that its red truck so blended in with the red glow of the landscape and was so obscured by smoke and fumes and gases as not to be discernible until it was too late to prevent a collision; that it parked its truck on the highway without having any tail light or other light burning and without in any way indicating its presence; that in violation of sections 103 and 104 of the Illinois statute on motor vehicles, the truck did not have lights on the rear which were visible for at least 500 feet; that it failed to provide or maintain any lookout for northbound traffic and that in violation of Section 88 of the said Act, it carelessly and negligently stopped and parked its truck upon the highway when it was practical to remove it.

We refer this court to paragraph 13 of the opinion of the Circuit Court of Appeals wherein, after analyzing the evidence to support the allegations of negligence, it finds evidence tending to support some or all of the claims in question. Nothing will be served at this point by an extensive discussion of the evidence involved, but we submit that if this court reviews the evidence it can come to no other conclusion than that set forth in paragraph 13 of the opinion of the Circuit Court of Appeals "that defendant's negligence was plainly disclosed" and that there is evidence to support the violation of all of the sections of the statute charged in the complaints, as well as the numerous charges of general negligence.

b. The question of plaintiffs' contributory negligence was one of fact and not of law, and was properly submitted to the jury.

In support of its contentions that defendant's acts were not the proximate cause of plaintiffs' injuries and that plaintiffs were guilty of contributory negligence, defendant has cited or quoted from approximately 30 cases.

The existence of negligence or contributory negligence in any particular personal injury case depends upon *all* of the facts and surrounding circumstances in that case, and it serves little purpose to cite holdings or quotations from other cases where but one of the elements of negligence of the instant case is involved. We, therefore, direct attention only to those cases that seem to bear some analogy to the facts in the instant case.

Defendant places great stress, as being controlling in the instant case, upon *Cooney* v. *F. Landon Cartage Co.*, 308 Ill. App. 444, wherein the plaintiff collided with the rear of a parked truck. We submit that the facts in that case differ widely from those in the instant case.

In the *Cooney* case the evidence clearly established that there were at least four red lights burning on the back of the truck at the time of the collision. It was proven that such red lights were seen by the driver of another car when he was about three or four blocks away, and that when he was approximately 500 feet away he was able to determine that the parked truck was not moving. There was nothing to impair visibility. The driver of the parked truck had run out of gas and was forced to leave his truck standing on the highway. The speed of plaintiff's car at the time of the collision was estimated all the way from 45 to 70 miles per hour. These facts surely bear no analogy to the instant case in which there was evidence of factors that impaired visibility, of the absence of lights on the rear of defendant's truck, of the fact that the defendant's truck was not visible until the plaintiffs were right upon it, that plaintiffs were traveling at a speed of from 15 to 20 miles per hour, and that there was no need whatever for the defendant to stop upon the highway.

The distinction in the cited case of *Geisen* v. *Luce*, 185 Minn. 479, is immediately apparent. The standing car was disabled and it was not practical to move it. The accident happened in daylight, and the court points out that as to

the standing car, "*Its presence was known to all; it created no surprise;* it did not obstruct a view of the traffic." In the case at bar, defendants' trucks were not disabled; it was practical to park them on the shoulder, or on a large gravel parking space a short distance ahead; their presence was not discernible and they certainly created a tragic surprise to plaintiffs.

In *Hogrefe* v. *Johnson,* 271 Ill. App. 469, and *Johnson* v. *Kushler,* 269 Ill. App. 553, the weather and road conditions, the acts of the parties and the fact that the cars run into were moving and not parked, furnish obvious differentials.

It is apparent from the quotations from the other cases cited by defendant that plaintiffs therein either did see, or unquestionably should have been able to see, the obstruction—conditions not present in the case at bar. It is also worthy of note that in all the other cases cited by defendant involving vehicles parked on the highway, the driver of the parked vehicle had no other choice than to leave his car or truck where it was.

The tendency of Illinois courts to avoid a rule of thumb as to what constitutes contributory negligence as a matter of law is well illustrated in *Skamenca* v. *Reeser,* 294 Ill. App. 216, wherein the court said (p. 221):

> "Owing to the density of the fog, the circumstances mentioned and the conflict in the evidence we are satisfied that all reasonable minds would not agree that the failure of the plaintiff to have lights of sufficient brilliancy to penetrate the fog and enable him to see 200 feet ahead constituted negligence. • • •
>
> "By this instruction the jury were told that the plaintiff must keep a lookout for other cars on the highway and then directed that his lookout must be such that if another car was on the highway he must see it when it was such distance from him that he would still have time to stop or slacken his speed and avoid a collision and that failure to do so constituted negligence.

"The rule embodied in this instruction is akin to the principles announced in *Lauson* v. *Town of Fond du Lac*, 141 Wis. 57, and cases in other jurisdictions where it is held that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such a speed that it cannot be stopped within the distance that objects can be seen ahead of it. In the *Moyer* case, 242 Ill. App. 308, the Appellate Court of the first district declined to follow those cases and held under the facts of that case the question of contributory negligence of the plaintiff was one of fact and not of law. To the same effect is *Miller* v. *Burch*, 254 Ill. App. 387.

"It is well settled that one driving an automobile upon the public highway must be on the lookout for other cars and must use every reasonable precaution he can to avoid collision but under the circumstances surrounding the collision in this case it was for the jury to say what kind of a lookout would be required of the plaintiff to avoid being guilty of contributory negligence."

In *Mapes* v. *Hulcher*, 363 Ill. 227, facts stated by the court (p. 228), were as follows:

"There is no controversy but that on the night of the accident the truck in question was stalled and standing either on, partly on or off of the concrete slab on this road, near the village of Hamel. Just where it (defendant's truck) was standing and why it was standing there, as well as the question of whether or not there were any lights on it, were controverted questions of fact. It was snowing on the night in question, and it is apparent from the testimony of all witnesses that visibility was limited and difficult. There was considerable evidence for the plaintiff that there was no light at all on the truck in question and that it was standing on the concrete slab. There was also evidence tending to prove that it was standing at a point near the bottom of a hill or incline some four hundred feet long, and that, even if the engine was stalled, it would have been possible for the driver, had he seen fit, to have coasted off of the slab to a stop by

the side of the road instead of on it. Several witnesses testified as to the lack of any lights at all on the truck and to the effect that it was standing on the slab. Two witnesses testified to its being stopped at a point near the bottom of an incline, so as to make it appear from the record that the driver had a choice as to whether he would stop on or off the hard-surfaced portion of the road. * * *

"He (defendant) testified that when he left Edwardsville all the lights were burning on the truck, including the head-lights, three lights on the cab and four lights on the trailer; that about eight miles north of Edwardsville the motor quit running and the truck stopped on the side of the road; that on examination he found himself unable to move it and that the battery appeared to be run down, and that he did not intend to stop there but did so entirely because of the failure of his engine. He further testified that all of his lights were burning before the collision. It was his testimony that he tried to stop the car in which the plaintiff was riding and waved a spotlight at them, and that the approaching car was traveling at an excessive rate of speed and ran into his truck with considerable force. There was testimony of some other witnesses that they saw lights on the truck after the accident. * * *"

After reviewing the conflicting evidence the court stated (p. 231):

"Our review of the evidence leaves it entirely clear that the trial judge had before him conflicting lines of evidence to be weighed and that we should not disturb his findings. If he believed the testimony of the driver of the car and of the plaintiff, it was an entirely sufficient foundation for a finding that the plaintiff was in the exercise of due care for her own safety at the time of the accident. If he believed the plaintiff's witnesses, the truck was without lights and stopped on the slab, when it might with equal convenience and greater safety to the public have been stopped off to one side of the road. There is sufficient evidence for all necessary factual findings, and we cannot see that there

has been any such finding that can be said to be contrary to the weight of the evidence or without evidence to support it."

c. Driving with dimmer or deflected lights is not negligence as a matter of law, but the question of negligence in such case is one to be determined in view of all the facts and circumstances in evidence

The Illinois courts have held that one is not necessarily contributorily negligent as a matter of law merely because he is driving with dim lights, but that such question is one to be determined in the light of all the surrounding circumstances existing at the time of the occurrence.

In *Miller* v. *Burch*, 254 Ill. App. 387, defendant was parked on the wrong side of the street. Plaintiff, proceeding at from 15 to 25 miles per hour, collided with defendant's car. The lights on plaintiff's car were on dim and, according to his own testimony, did not illuminate the road more than about 3 feet in front of the car and were of no assistance to him in distinguishing objects at more than that distance. Whether defendant's lights were on was a disputed question. Defendant contended that the plaintiff was guilty of contributory negligence as a matter of law and that the trial court should have directed a verdict in defendant's favor.

The court stated (p. 391):

"This brings us to a consideration of whether defendant's conclusion that plaintiff was guilty of negligence as a matter of law is a correct one, basing his conclusion, as he does, on the single fact that plaintiff was running with his lights on dim. * * *

"We are aware that in a number of cases in Illinois, and among them the case of *Johnson* v. *Gustafson*, 233 Ill. App. 216, cited and relied on by defendant, the statement will be found that the violation of a statute or ordinance is negligence as a matter of law.

"In most of the cases examined, the decision was

not based on the statement that plaintiff was guilty of negligence as a matter of law, nor was it necessary to the decision. * * *

"In short, whether under all the conditions and circumstances surrounding plaintiff as he proceeded south on Court Street, his conduct was 'So violative of all standards of conduct applicable to persons in a like situation' that all reasonable minds would conclude that he was negligent. If it was not, then, although he may have been negligent as a matter of fact, he could not properly be said to be negligent as a matter of law. Hence the jury was properly permitted to pass on that question of fact, and if the jury had a basis in the evidence for finding that the conduct of the plaintiff did not constitute negligence then, in such case, no one would contend there could be such a thing as negligent contribution to the cause of the injury, negligence of plaintiff having been eliminated (p. 394). * * *

"We do not think our courts have, in any case, construed our statute as meaning the lights shall so illuminate the road that the driver 'could see at least two hundred feet in the direction in which he was driving,' nor do we think they have ever held that the failure to have such lights or to so use them, if he has them, of itself alone, constitutes negligence, so that the proof of that fact alone is sufficient to establish negligence" (p. 397).

In citing *Scruggs* v. *Baltimore & Ohio R. Co.*, 287 Ill. App. 310, defendant quotes a small portion of the opinion, without giving sufficient of the facts to explain the decision. Considering that in that case it was a bright, clear, moonlit night with no shadows or obstructions affecting visibility, plaintiff therein, had she been looking, should have been able to see a box car 40 feet long and 10 or 12 feet wide standing on the track across the highway at more than 20 feet without any lights at all. The decision was clearly predicated upon the fact that the evidence showed that plaintiff was not observant.

It is apparent from defendant's quotation from *Johnson* v. *Kushler,* 269 Ill. App. 553, that the court did not state without qualification or limitation that one driving on a country highway at night without his bright headlights burning is negligent, but that "under *all* the facts and circumstances in evidence in this (*Johnson* v. *Kushler*) case," the plaintiff was so guilty. *Johnson* v. *Gustafson,* 233 Ill. App. 216, and *Sugru* v. *Highland Park Yellow Cab Company,* 251 Ill. App. 99 are cited in support of the quotation from *Johnson* v. *Kushler.* Neither is in any way analogous to the case at bar. In *Johnson* v. *Gustafson,* the automobile was "equipped with ordinary headlights, but that they were not lighted" (p. 219) and it is obvious that in *Sugru* v. *Highland Park Yellow Cab Company* that the headlights were not lit and that "only the parking lights and spotlight were used."

In the case at bar it is not disputed that the headlights on plaintiffs' car were lighted, those filaments in the headlight bulbs being used which provided a more concentrated, downward focused light, commonly called town, driving or dimmer lights.

A case in point is *Carroll* v. *Krause,* 295 Ill. App. 552, wherein defendant's truck, parked on the highway due to a blowout, was struck from the rear by a car in which plaintiff's intestate was riding. The court said (p. 566):

> "As stated, it is contended by the defendant that the decedent was guilty as a matter of law of contributory negligence in riding in the Essex coach before and at the time of the accident, because the car was, before and at the time of the accident, being driven with dim lights.
>
> "Ferry, the driver of the Essex car, testified that for some hours before, and at the time of the accident, he was driving the car with dimmers; that at the time of the collision he was driving the car at the speed of about 35 to 40 miles per hour; that he did not see the truck before the collision until he was

about 20 feet from it; that he could see ahead with the lights dimmed, about 50 feet. Sexton, who was riding with Ferry, testified that the lights on the car threw a beam of light about 10 to 15 feet ahead of the car. * * *

"It has *not* (italics ours) been held that proof of the fact that the lights of a car were not sufficiently bright to disclose objects in front of the car for a distance of 200 feet is alone sufficient as a matter of law to prove negligence on the part of the driver of the car, in the event of the car colliding with an unlighted motor vehicle on the highway. * * * However, the question of whether the driver of the car, before and at the time and place of the collision, was negligent, depends on all the facts and circumstances shown by the evidence. * * * Such as: 1. Whether plaintiff should have apprehended the danger. 2. Whether the place where plaintiff was driving, and had a right to drive, was a safe place to drive with dim lights. 3. In short, whether under all the conditions and circumstances surrounding plaintiff as he proceeded along the highway, his conduct was so violative of all rational standards of conduct applicable to persons in like situations that all reasonable minds would conclude that he was negligent. If it was not, then, although he may have been negligent as a matter of fact, he could not properly be said to be negligent as a matter of law. Hence the jury was properly permitted to pass on that question of fact. * * *"

d. The plaintiffs were entitled to assume that the highway ahead of them was not unlawfully obstructed, and their actions after entering the area of smoke and glare were those of reasonably prudent men, in view of all the surrounding circumstances.

Defendant contends that if plaintiffs' view of the parked truck was in fact obscured, plaintiffs, as a matter of law, were negligent if they did not apprehend danger and stop until the obstruction to vision had come to an end. Plaintiff, Miller, testified that in driving up to the lighted area

there was a fog across the east side of the road and that coming into the fog he decelerated (R. 248) and then began to apply his brakes gradually (R. 248); that he didn't know definitely how far he traveled through the fog but that he kept increasing his brakes and that suddenly the fog lifted and a mass appeared ahead of him (R. 248); that he had no idea how fast he was traveling after he applied his brakes because the speed of the car was dropping down constantly and that he did not look at his speedometer because he was keeping his eyes on the road ahead (R. 275). We submit that the foregoing shows that Miller's reaction to the circumstances was that of a reasonably prudent man. Plaintiffs had no reason to believe or anticipate that defendant's truck would be unlawfully parked, without lights, on the highway, camouflaged and obscured by the smoke and glare of the fusees.

The right of a driver of a vehicle to assume that the highway ahead of him is not unlawfully obstructed is illustrated in *Sidle* v. *Baker*, 52 Ohio App. 89, 3 N. E. (2nd) 537 wherein the court said (pp. 93-4):

> "Nor, in the absence of any visible sign of danger, did he (plaintiff) owe to the defendant any duty to assume that the defendant would be unlawfully parked on the highway, directly in his path. On the contrary, he had, under such circumstances, a right to assume that all other users of the highway would use it in a lawful manner, and that if it became necessary to stop they would stop in a lawful manner, and park in the manner prescribed by law. *Hess* v. *Kroger Grocery & Baking Co.*, 17 Ohio Law Abs., 225, 40 O. L. R., 153; *Mossholder* v. *Head*, 13 Ohio Law Abs., 421, 37 O. L. R., 372.
>
> "If the proposition above stated means anything, it means that the plaintiff was entitled to act upon the assumption which he had a right to make, and to rely upon its truth as fully as when he could see it to be true, and to govern the operation of his automobile and its speed accordingly."

In *Body, Fender & Brake Corp.* v. *Matter,* 172 Va. 26, 200 S. E. 589, the court said (p. 30):

> "In the instant case defendant sought to show that a proper warning had been given approaching travelers by the use of a flashlight. Upon this question there was a conflict of evidence and therefore the duty devolved upon the jury to determine whether or not reasonable care had been exercised by the defendant in the operation of its wrecking truck upon the highway. The verdict of the jury resolved the question in favor of the plaintiff. *Ferguson* v. *Virginia Tractor Co.,* 170 Va. 486, 197 S. E. 438, 440. * * *"

Each of the cases cited and relied upon by defendant is readily distinguishable upon the facts. In each of such cases plaintiff either had knowledge of dangerous conditions, express warning thereof or the condition continued for so long a time as to constitute warning or knowledge. In *Johandes* v. *Chicago, M. & St. P. R. Co.,* 260 Ill. App. 328, plaintiff approached a known dangerous railroad crossing with which he was familiar; in *Hazel* v. *Hoopeston-Danville Motor Bus Co.,* 229 Ill. App. 125, plaintiff's driver drove nearly 1000 feet totally blinded; in *Ill. Cent. R. R. Co.* v. *Oswald,* 338 Ill. 270, plaintiff went on foot onto the roadway obscured by smoke knowing that other autos might come along and admittedly without "thinking of other machines"; and in *Dominick* v. *Haynes Bros.,* 13 La. App. 434, both drivers had been stopped by road guards and instructed to turn on their lights, drive slowly and keep to the right side of the road.

In *Moyer* v. *Vaughan's Seed Store,* 242 Ill. App. 308, defendant appealed from a judgment against it, contending that it was entitled to a peremptory instruction at the close of the case, on the grounds that it was negligence, as a matter of law, to drive an automobile along a public highway in the dark at such speed that it could not be stopped within a distance that objects could be seen ahead of it.

The court said (pp. 312, 313):

"In considering the question, the Supreme Court of Iowa in the *Kendall* case, 183 Iowa 866, held that whether the driver of an automobile who failed to have it under such control that he could stop it within the distance that he could plainly see ahead of him, was a question of fact and not a question of law. The court there expressly referred to the *Lauson* case, 141 Wis. 57, and refused to follow it. And in passing on this question the Supreme Court of Connecticut, where the facts were somewhat similar to the facts in the instant case, held that whether the driver of the automobile was guilty of negligence was a question of fact to be determined from the evidence. *Baldwin* v. *City of Norwalk*, 96 Conn. 1; *Rice* v. *Foley*, 98 Conn. 372. So in the case at bar we are of the opinion that whether the driver of plaintiff's automobile was guilty of negligence which contributed to the collision was a question of fact and not one of law, and, therefore, the peremptory instruction requested by defendant was properly refused. Of course there may be situations where it may be negligence as a matter of law for one to drive an automobile along a public highway in the night-time at such speed that it cannot be stopped within the distance that objects can be seen ahead of it. The test in such cases is, would all reasonable minds reach the conclusion that the conduct of the driver of the automobile was violative of rational standards of conduct applicable to persons in similar situations? *Kelly* v. *Chicago City R. Co.*, 283 Ill. 640; *Bale* v. *Chicago Junction R. Co.*, 259 Ill. 476; *Louthan* v. *Chicago City Ry. Co.*, 198 Ill. App. 329; *Rehthaler* v. *Crane Co.*, 218 Ill. App. 267.

"In the instant case we think it cannot reasonably be said that the driver of plaintiff's automobile was guilty of negligence as a matter of law. The night was dark and misty. The plaintiff was driving along a country road where standing vehicles were not to be expected. There is evidence to the effect that there was no rear light on the truck; that the color of the truck and its load blended with the coloring of the

surface of the road. These, and many other circumstances which might be alluded to, show that all reasonable minds would not reach the conclusion that the driver of plaintiff's automobile was acting as no rational person would act under like circumstances, and, therefore, the question to be determined was one of fact and not law."

To the same effect see *Skamenca* v. *Reeser*, 294 Ill. App. 216, 219.

Prior to coming upon the scene plaintiffs herein were traveling at a reasonable and lawful rate of speed. They had no notice of the unlawful presence of defendant's truck, and no reason to anticipate danger therefrom. When his vision became obscured, Miller immediately slowed his speed and continued to slow down until the crash. It surely cannot be said that plaintiffs' conduct was such that all reasonable minds would conclude that it "was violative of rational standards of conduct applicable to persons in similar situations."

e. The illegal parking on the highway of defendant's truck was the proximate cause of plaintiffs' injuries.

In *Rhoden* v. *Peoria Creamery Co.*, 278 Ill. App. 452, 462, the Appellate Court explains the holding in *James* v. *Motor Transit Management Co.*, 260 Ill. App. 246, *Collins* v. *McMullin*, 225 Ill. App. 430, and similar cases cited by defendant, as being limited to holding that where a driver has no other choice except to leave his vehicle upon a portion of the paved road, there may be no liability by reason thereof, but that whenever it is possible to move such vehicle, failure to do so is the proximate cause of injury resulting therefrom.

Other cases cited by defendant, where the obstruction, railroad car, automobile or bus were known or perfectly apparent to anyone driving upon the highway, or where the violation complained of was technical rather than

actual, such as leaving a few inches or a few feet less space than specified, or leaving railroad cars standing overtime, we submit are not persuasive.

Defendant's illegal parking under the circumstances here present was the proximate, not a remote, cause of the collision. In fact, the circumstances here present created a trap for oncoming cars, as in *Emrick* v. *Phillips*, 134 Pa. Sup. Ct. Reports, 45, wherein the court said (p. 49):

> "In the present case while Emrick knew from the flare that a truck was stalled on the southbound traffic lane, he did not know and had no reason to think that it had buckled and part of it was extending over the center line of the road into the northbound lane of traffic, and he did not become aware of the negligent action of defendant's driver in so leaving it, until he was too close to prevent the collision. The flare in the road and the lights from the oncoming automobile diverted his attention from the trap which the negligence of defendant's driver had left in the road, and which the flare in the center of the southbound lane, 150 feet north of the stalled truck, would not give notice of."

In *Fitzpatrick* v. *California & Hawaiian Sugar Ref. Corp. et al.*, 309 Ill. App. 215, defendant Gaskill's attention was attracted to a car turned upside down in a ditch adjoining the highway. He stopped on the pavement to render aid to the ditched car and plaintiff's car, which had been following, ran into his rear. Upon appeal from a judgment for plaintiff the court said (p. 219):

> "In the instant case there was no emergency, beyond the control of the driver of the car which stopped on the paved highway. Defendant Gaskill testified that his purpose in making this stop was to see if he could give some assistance to anybody that might have been hurt in the previous accident. It is argued on his behalf that it was not practical to drive off of the paved highway onto the shoulder, but there is no evidence in support of that, Gaskill's testimony in that

regard being to the effect that there was enough space between the ditch and the paved portion of the highway for him to pull out there on the dirt. However, the question as to whether it was practical for him to have done so is more or less academic, in the light of his reason for stopping. If the humanitarian urge to aid some one in apparent distress was strong enough in the defendant, he could have taken the chance of injury to himself, or damage to his car, and have driven off on the shoulder regardless of its condition. * * *

"There was no evidence that there was anything mechanically wrong with his car, or that there was any obstruction on the highway. Our courts have held that the only excuse for stopping on the pavement is an emergency or exigency which leaves no other choice. *Hand* v. *Greathouse,* 294 Ill. App. 383-388, 13 N. E. (2d) 1010; *Frochter* v. *Arenholz,* 242 Ill. App. 93; *Sugru* v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99; *Crawford* v. *Cahalan,* 259 Ill. App. 14; *McLaren* v. *Byrd, Inc.,* 296 Ill. App. 345, 15 N. E. (2d) 993; *Mayhak* v. *Edward J. Meyers Co.,* 306 Ill. App. 284, 28 N. E. (2d) 343 (Abst.)."

The issues of fact in *Bos* v. *Richards,* 71 Fed. (2d) 262, are so substantially similar to this case that upon a review of that decision one can come to no other conclusion than that the proximate cause of plaintiffs' injuries was the illegal parking of defendant's truck upon the highway and that the question of such proximate cause was properly submitted to the jury.

To the same effect see:

Moyer v. *Vaughan's Seed Store,* 242 Ill. App. 308, 312-3.

Mapes v. *Hulcher,* 363 Ill. 227, 228, 231.

There was a direct, unbroken causal connection between the illegal parking of defendant's truck and the occurrence complained of; the position of the truck, under the circumstances, constituted a trap for oncoming traffic—a trap

into which plaintiffs fell. There was no necessity for the defendant's driver to stop his truck and cross over to the west side of the road. Even conceding his desire to of assistance, he was, nevertheless, culpably negligent in not pulling off the pavement. The issue of proximate cause was properly submitted to and found by the jury in favor of plaintiffs.

III.

There Was No Variance Between the Allegations of the Complaints and the Proof.

Directly contrary to the record, petitioner herein states that the accident occurred within the corporate limits of the Village of Glencoe and based upon that misstatement, contends that the Circuit Court of Appeals erred in not holding that there was a variance between the allegations and the proof.

It is alleged in paragraphs 3, 4, and 7 of Count I of the complaint (R. 3) that the situs of the accident was outside the limits of any city, village or incorporated town (R. 3). The defendant in its Amended Answer, paragraphs 1 and 2 (R. 17) expressly admit the allegations of time and place of the occurrence (R. 17).

Plaintiffs offered no evidence on this point, and the only evidence introduced by the defendant pertaining thereto was a plat of Skokie Road, Deft's. Ex. 2, (R. 308-10) which purported to show that certain portions of Skokie Road are inside and others outside incorporated areas. The plat is dated April 11, 1941, and purports to show boundaries as they existed on that date—two years after the accident. The trial court struck from the plat all designations as to what was and was not incorporated territory and instructed the jury to disregard them (R. 320). There was thus no evidence of any kind, shape or form in the record as to what were or were not the corporate limits

of the Village of Glencoe and there could not have been any variance between the allegations and the proof on that point.

And even if a variance could be considered to exist it was neither material nor fatal. There were eight specifications of negligence, including general negligence set forth in the complaints, at least five of which without question pertained to both incorporated and unincorporated areas, and any one of which is sufficient to sustain the verdicts.

Conclusion.

It clearly appears that in affirming the judgment of the trial court, the Circuit Court of Appeals has not "decided any important question of local law in a way probably in conflict with applicable local decisions." Quite to the contrary, its decision is entirely in accord with and based upon principles repeatedly announced by the Supreme and Appellate courts of Illinois in negligence cases.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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